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IN THE

Supreme Court of the United States

OCTOBER TERM 1952

No. 161

GUSTAVE MACHATY,

Petitioner,

against

ASTRA PICTURES INC., MICHAEL M. WYNGATE INC., MARTIN LICHT,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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ASTRA PICTURES INC., MICHAEL M. WYNGATE L[illegible], MARTIN LICHT,

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BRIEF FOR RESPONDENTS IN OPPOSITIO[illegible] TO PETITION FOR WRIT OF CERTIORAR[illegible]

Statement of the Case

In petitioner's "Outline of the Case and Questi[illegible] Pre-sented" he would make it appear in the first and[illegible] cond paragraphs thereof (Pet. p. 2) and subsequent di[illegible]ssion (unsupported by citations from the record) that p[illegible]ioner had produced a completed motion picture and th[illegible] after entered into a distribution contract with Elekt[illegible] Film. This is diametrically opposed to the actual facts here-inafter shown.

(Machaty was the producer of the film only in t[illegible] sense that he directed its production and was in charge[illegible] was the head of production; the film was produced b[illegible]lekta Film in the same way that Paramount Films pr[illegible]es a picture, giving credit as producer to the man in [illegible]rge.)

In July, 1932 (682) * Elekta Film agreed to "manufacture" the motion picture Ecstasy according to the plan of the petitioner. (In less stilted translation—produce under the direction of Machaty.) Petitioner guaranteed that the picture would not cost more than 745,000 crowns (683) and agreed to deposit 150,000 crowns against production costs exceeding this amount (684). The 150,000 crowns were never paid by petitioner (1899). It cost Elekta 2,500,000 crowns to produce the picture which was never recouped (529). Elekta was granted the unlimited right to sell in foreign countries (686; p. 669) and Elekta was to own the negative and all rights until its production costs had been recouped (688).

The picture was completed on the basis of this agreement and first shown in Prague in 1933 (64).

In 1934 Elekta granted to Eureka Productions Inc. an exclusive distribution contract for the U. S. (Pl. Ex. 10; 895-923, 96) and Eureka copyrighted the picture with the consent of one Auerbach, president of Elekta (542) of all of which petitioner had knowledge and consented to. This is clear from the record despite his denials: he must have been told of this deal (1283, 1285, 1770, 1774) he made changes in the picture to make it palatable for American consumption (523, 534) he expected the picture to be copyrighted in whatever country shown (1355) authorized Elekta to permit copyright (1382) in fact had no interest in such legalities (1157).

In 1938 Elekta gave the American distribution rights to one Weingarten effective on the termination of the Eureka deal (Pl. Ex. 4; 700-705) who assigned the same to Wyngate. In 1940 they sued Eureka for infringement in continuing to distribute Ecstasy and obtained a judgment (1870) enjoining Eureka and one Cummins from in any manner dealing in Ecstasy which judgment determined that Wyngate and Weingarten owned all rights in the picture (1869). This judgment was thereafter settled by

* Unless otherwise noted references are to folios of record.

Eureka assigning all of its rights in the picture and its copyrights to Weingarten and Wyngate (1809-1818) and *covenanting to obey the injunction unconditionally* (1821).

In 1942 respondent Astra succeeded to the rights by assignment and became the title owner of the copyrights (718-727).

Machaty came to this country in 1936. He claimed that he never saw the picture between then and 1947 (248). Pursuant to agreement dated August 15, 1947 he licensed (941) none other than Eureka and Cummins to exhibit Ecstasy, being able to do so because he had smuggled into this country an old negative of Ecstasy (1217) from which prints for exhibition could be made (all other negatives and prints being in the possession of Astra).

Such new abortive license (941) by its language shows a consciousness of lack of belief that Machaty had enforceable rights and an intent on the part of Eureka and Cummins to evade the New York injunction and previous covenant not to infringe by setting up a colorable agreement. In fact such agreement dated August 1947 makes reference to the now abandoned Czech judgment which is dated September 1947 (786). Such consciousness is further clear from the following: Machaty told the incredible story that when he made this agreement with Cummins he was never told that Eureka owned the copyright (1178); the New York judgment and its implications were never discussed, though they had a copy of the record (1183), he was never told Cummins was under injunction (1184), the problem of obtaining prints for exhibition was never discussed (1184) although Cummins said he had none (1720).

Machaty's awareness of the fact that his conduct was that of a man who did not believe he had any rights in the picture, and his attempt to anticipate and negative proof thereon is clear from his testimony. To show why he did nothing about the picture for 10 years he originally testified he never saw the picture from 1937 to 1947 (248), didn't know it was shown in this country (1176), never saw the

picture (1222), but then was forced to admit that he had seen the picture in Los Angeles in 1937 (246, 1364) but was so disinterested in his rights that he didn't inquire into who was distributing it (1341). And in 1942 he sueed everybody for infringement (1017) and then discontinueed the action and gave a general release to Auerbach for $4000 (1078, 1090).

Although no testimony was offered by petitioner to show that Elekta had recouped its production costs, he attempted to clear one hurdle by a barefaced statement, unsupported by other proof that he had paid the 150,000 crown guarantee required by the contract (684). On this first requirement for the ripening of any right he told many different stories: he made the payment in full (54) after the making of the July 12th agreement (55) on July 12 (203), 80,000 crowns on July 12, 70,000 crowns later (204, 1589-1616); he didn't remember if it had been paid (205); the entire amount was paid at once (207); it was not paid in full (211); doesn't know (1159-1160); paid all in cash on July 12th (1372). Auerbach testified the 150,000 crowns had never been paid (526). The Court was clearly correct in refusing to give any credence to this claim of payment (1899). Finally on the appeal below petitioner for the first time urged that this payment had been waived.

Petitioner's main claim was bottomed upon an alleged instrument dated September, 1932 (Pl. Ex. 20, p. 355), the original of which has never been produced in any litigation. Machaty claimed this instrument modified the July 12th agreement and terminated Elekta's rights in 1937. As to the existence and genesis of this agreement Machaty also told many conflicting stories: the original was on file in a Czech court in Prague (135); he didn't know where it was (152-157, 1106); it was not on file in the Czech court (1138); he never said the original was not on file (152); a copy of the original was on file (1240); he never had the original in his possession (1632); the Czech file contained a copy made by his Czech lawyer (1235). A mere reading of the alleged agreement (p. 355) indicates there was no

consideration whatsoever or even reason for Elekta to have circumscribed its rights. Auerbach testified he never signed such an agreement (528, 529).

Petitioner attempted to account for the production of a copy rather than the original and again told many different stories: he took the copy with him when he left Czechoslovakia in 1936 but wasn't sure (214, 1523, 1554); he did take it with him (221); he didn't make a copy (229); the copy was made by his lawyer (1235); the instrument produced was a copy, made by a friend, of a copy made in Czechoslovakia (1115-1118, 1241, 1690). That the Court correctly refused to credit the existence of this alleged agreement or the competency of the copy is clear (1904, p. 667).

Machaty's credibility was shattered on many other minor points. The above summary of the record exposes the reason why petitioner has failed to advert thereto and the Court's reference (p. 666) to the man who flung himself upon his horse and rode madly off in all directions.

Being unable to establish any case upon the facts, petitioner now urges solely legal concepts having no application to the above facts, that respondents hold the rights in Ecstasy in trust for Machaty; that a New York judgment for accounting against only Elekta is res adjudicata and determinative of Astra's rights.

POINT I

Machaty failed to prove he had any rights in Ecstasy.

Solely on ad hominem argument, with an understandable failure to advert to the record, petitioner contends that since the copyrights legally in the name of respondent are held in trust which was decided in the companion case of *Astra* v. *Eureka, et al.* (this Calendar #162), they must be held in trust for Machaty. But such decision was in the other case and a determination of the rights of

Astra vis-a-vis *Eureka, et al.* (p. 670). The pronouncement in that case of the existence of a trust has no bearing on this case in which the Court determined that Machaty had no rights in the picture (p. 664) sufficient to even invoke any trust doctrine.

This is clear from the record which petitioner ignores. The proven contract between Elekta and Machaty gives Elekta all rights until production costs are recouped (688). Elekta spent 2,500,000 crowns which were never recouped (529, p. 665) Elekta, apart from any obligation to account, therefore still has all rights in the picture as against Machaty.

That such rights may be and properly were assigned by Machaty to Elekta is clear from the agreement of July 12; the right to obtain a copyright and permit Eureka to do so at all times was vested in Elekta.

American Tobacco Co. v. *Werckmeister,* 207 U. S. 284.

Houghton Mifflin Co. v. *Stackpole Sons,* 104 F. 2nd 306.

Callaghan v. *Meyer,* 128 U. S. 617.

Gerlach-Barklow Co. v. *Morris & Benshen,* 23 Fed. 2nd, 159.

31 Corpus Juris, Sec. 270.

Uproar v. *National Broadcasting Co.,* 81 Fed. 2nd, 373.

Machaty knew copyrights were to be taken out by Elekta, had been taken out by Eureka, consented thereto, ratified the same by his conduct, actually had not interest therein and was guilty of gross laches. His trusted friend informed him of all contracts and certainly must have told him about the unanticipated American deal (1285, 1770, 1774, 1287, 1283). Auerbach testified without contradiction Machaty personally aided in making changes in the picture to make it suitable for American consumption (532-534). Machaty admitted he knew the picture would be copyrighted wherever

shown (1355). He fully authorized Elekta to permit others to copyright it (1382) and had no interest in it (1223, 1157, 1340, 1341).

That petitioner has no present rights in the picture is clear. That the copyright is valid by long acquiescence (*Fitch* v. *Shubert*, 20 F. S. 314) and that petitioner in any event is guilty of such laches as to clearly establish that he had abandoned any claims that he may have had, is patent from all of the foregoing facts and his own pithy pronouncement (1343) and the applicable authorities.

Holmberg v. *Arnbrecht*, 327 U. S. 392.
Witkey v. *S. T. McKnight*, 87 Fed. 2d, 916.
Crites v. *Radtke*, 19 Fed. Supp. 238.
Fretwell v. *Gillette*, 106 Fed. 2nd, 728.
Isaac v. *Milton Mfg. Co.*, 33 Fed. Supp. 732.
Weigand v. *Trent*, 122 Fed. 2nd, 921.
Egner v. *Schirmer Co.*, 48 Fed. Supp. 187.
Davella v. *Harms*, 36 Fed. Supp. 843.

Elekta's production costs never having been recouped, Machaty never having paid the 150,000 crown guarantee, it is clear that petitioner never established any rights to the picture. *Pulte* v. *Derby*, 5 *McLean* 328; Fed. Cases #11465. In all events any such rights were abandoned or lost by laches.

POINT II

The judgment of the New York Court was properly excluded.

Petitioner relies on only one other point—a judgment in the Supreme Court of the State of New York obtained against Elekta for an accounting (794). Such default judgment was properly excluded as wholly irrelevant to the issues at bar (p. 668) since respondent could not be deprived of the defenses which it had against petitioner (Point I, supra) not available to or urged by Elekta. That

Elekta had to account to Machaty, and was sued therefor and a judgment obtained was not a determination with respect to ownership and copyright rights. *Leo Feist, Inc.* v. *Song Parodies,* 146 Fed. 2nd 400. Since Astra was not a party to the suit and had other defenses available to it, such judgment was not binding on it. *Cromwell* v. *Sac County,* 94 U. S. 351; *Boynton* v. *Moffatt,* 57 Fed. 2nd 772 and finally the judgment is in no way binding on a federal court since a state court has no jurisdiction to determine the validity or infringement of a copyright, the issue at bar. *Condon* v. *Associated Hospital Service,* 287 N. Y. 411; *Underhill* v. *Schenck,* 238 N. Y. 7.

POINT III

The petitioner has not shown a right to the writ.

Petitioner blithely states, without even supporting argument, that "this case falls within more than one of the classes described in paragraph 5 of Rule 38 of the Rules of this Court as appropriate for certiorari" (Petition, p. 6).

It falls within none.

The Court of Appeals affirmed the District Court and the District Court upheld respondent's contentions on all issues of fact which had to be first determined before applying any legal concepts which might bottom petitioner's rights.

There are no constitutional or important legal questions requiring decision of this Court; the decision is not in conflict with that of any other Circuit, or of this Court; the questions presented are not novel.

No sufficient reason has been shown to warrant the granting of the writ.

Since petitioner concedes there is no issue of fact, there is not even necessity for the exercise of this Court's supervision.

CONCLUSION

The petition for writ of certiorari should be denied.

Respectfully submitted,

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